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IN THE

Supreme Court of the United States

October Term, 1969

No. 361

RUSSELL BYNUM PROCTOR,
Petitioner

v.

MARION KING PROCTOR,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

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RUSSELL BYNUM PROCTOR,

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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

Russell Bynum Proctor ("Petitioner") prays that a writ of certiorari issue to review the judgment of the Superior Court of Pennsylvania entered in the above-entitled case on September 12, 1968.

OPINIONS BELOW.

There are three opinions below: namely, the Order of the Court of Common Pleas of Montgomery County, Pennsylvania, No. 66-15339, entered October 10, 1967, with the accompanying Opinion dated February 29, 1968; the Opinion of the Superior Court of Pennsylvania, No. 39 October Term, 1968, filed September 12, 1968; and the Per Curiam Order of the Supreme Court of Pennsylvania entered April 24, 1969 denying Petition for Allowance of Appeals from the Judgment of the Superior Court. The Opinion of the Court of Common Pleas of Montgomery County, Pennsylvania is printed in Appendix A, *infra,* page 13. The Opinion of the Superior Court of Pennsylvania affirming the Order of the Court of Common Pleas of Montgomery

County is printed in Appendix A, *infra*, page 28, and is reported in 213 Pa. Super. 171 and 245 A. 2d 684. The Per Curiam Order of the Supreme Court of Pennsylvania denying Petitioner's Petition for Allowance of Appeal from the Judgment of the Superior Court is printed in Appendix A, *infra*, page 33, and is not reported elsewhere.

JURISDICTION.

The judgment of the Superior Court of Pennsylvania was entered September 12, 1968. A Petition for Allowance of Appeal from the Judgment of the Superior Court, timely filed by Petitioner, was denied Per Curiam by the Supreme Court of Pennsylvania April 24, 1969.

Petitioner invokes the jurisdiction of this Court under Section 1257(3) of the Judicial Code, 28 U. S. C. § 1257(3).

QUESTION PRESENTED.

Did the Superior Court of Pennsylvania violate the United States Constitution by refusing to give full faith and credit to a valid decree of the Georgia Court awarding Petitioner custody of his minor daughter?

CONSTITUTIONAL PROVISION.

The provision of the United States Constitution involved is Section 1 of Article IV:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

STATUTE.

The statutory provision involved is Section 1738 of the Judicial Code, 28 U. S. C. § 1738. It is printed in Appendix A, *infra*, page 34.

STATEMENT OF THE CASE.

A. Nature of the Proceeding.

This case involves the proper application of the Full Faith and Credit Clause of the United States Constitution, as implemented by Congress in Section 1738 of the Judicial Code, to child custody proceedings.

On December 14, 1966, Petitioner, Dr. Russell Bynum Proctor, instituted a Petition for Custody in the Court of Common Pleas of Montgomery County, Pennsylvania against his former wife, Marion King Proctor, Respondent, to obtain custody of their minor daughter, Holly Christine Proctor, born December 21, 1959. At that time Petitioner was a resident and domiciliary of Georgia, Respondent was a resident and domiciliary of Pennsylvania, and Holly Christine Proctor was living with her mother, Respondent, in Montgomery County, Pennsylvania. The Petition asked the Montgomery County Court of Common Pleas to enter a Rule upon Respondent to show cause why custody of their daughter, Holly, should not be awarded to Petitioner in accordance with a prior Georgia custody decree entered November 7, 1966 by the Superior Court of Camden County, Georgia. The custody petition alleged that the Georgia decree was entitled to full faith and credit in Pennsylvania.

Preliminary Objections filed by Respondent were overruled by the County Court April 20, 1967. An Answer and New Matter, filed April 28, 1967, alleged that the Georgia decree was not entitled to full faith and credit by Pennsylvania courts. Evidentiary hearings were held by the County Court May 18, July 7, July 14, and August 31, 1967.

On October 10, 1967 the Court of Common Pleas of Montgomery County, Pennsylvania entered an Order awarding custody of the minor child Holly to Respondent, with certain visitation rights allowed Petitioner. On No-

vember 10, 1967 the Petitioner appealed the foregoing Order to the Superior Court of Pennsylvania. An Opinion was then filed in the County Court February 29, 1968. The Court of Common Pleas of Montgomery County, in its Opinion, clearly ruled that Pennsylvania Courts need not give full faith and credit to custody decrees of sister States:

> "However, due to the fact that the controlling factor in all proceedings is the welfare of the child, all custody decrees, whether entered in this Commonwealth or a foreign jurisdiction, are accordingly temporary in nature, and the Courts of this Commonwealth are not bound either legally or morally to the decree of a sister State awarding custody of a minor child, even though they cannot lightly ignore the considered judgment of a sister State, and an independent judgment of the ultimate question of the best interests of the child may be made by said Courts on the same facts that determined the order of the foreign State."

The Superior Court of Pennsylvania affirmed the Order of the Court of Common Pleas of Montgomery County. The Superior Court found that because the child has resided for two years in Pennsylvania, having been taken out of Georgia by her mother, the Georgia Court would find a "material change of circumstances" and would not consider its prior award of custody *res judicata*. Therefore, the Court held that Pennsylvania need not accord the Georgia decree full faith and credit.

B. The Facts.

The parties were married and resided in Georgia; a daughter, Holly, was born of that marriage, in December, 1959. In February, 1966, the parties separated and Holly remained with her mother, Mrs. Proctor (Respondent). In

June, 1966, a Georiga court action to obtain custody of Holly was instituted by her father (Petitioner). Subsequently, Mrs. Proctor was advised by her attorney that she had been awarded temporary custody of Holly by the Georgia court, which retained continuing jurisdiction of the matter. That same day, Mrs. Proctor filed a libel for divorce in Georgia, obtained Holly forcibly with the aid of a friend who possessed Mrs. Proctor's .22 target pistol, and, together with Holly, left Georgia. After a three week stay in Maryland, they moved into the home of Mrs. Proctor's parents in Montgomery County, Pennsylvania, where they have since resided.

On August 20, 1966, the Georgia Superior Court of Camden County, proceeding under a cross bill filed by Petitioner, Dr. Proctor, in the divorce action, entered an order awarding temporary custody of Holly to Petitioner. Petitioner then came to Pennsylvania with his attorney and served a copy of the order on Mrs. Proctor on August 27, 1966. A hearing upon these actions in Georgia was held on November 7, 1966, which resulted in the awarding of permanent custody of Holly to your Petitioner. It is this custody order which Petitioner sought to enforce in the Courts of Montgomery County.

C. Petitioner's Position.

It is Petitioner's position that the Court of Common Pleas of Montgomery County, Pennsylvania erroneously decided that all custody decrees are temporary in nature and never entitled to be afforded full faith and credit by a sister state.

Section 1 of Article IV of the United States Constitution and Section 1738 of the Judicial Code do not give any discretion to sister states as to which judgments or judicial proceedings of the state are to be accorded full faith and

credit by another state. The Full Faith and Credit Clause of the United States Constitution, as implemented by Congress, requires the Pennsylvania court to treat the prior Georgia custody decree with the same full faith and credit that such decree would have by law and usage in the courts of Georgia.

Under Georgia law, a prior custody decree is *res judicata* as to the award of custody, and not merely the underlying facts, in the absence of a finding that circumstances have so materially changed that the welfare of the child will be substantially enhanced by modifying the original judgment. Therefore, the lower court erred by refusing to enforce the Georgia custody decree, without first determining (according to Georgia standards) whether there were such material changes in circumstances since the first decree as to substantially enhance the welfare of the child by ordering a change of custody.

The Superior Court of Pennsylvania refused to apply the Full Faith and Credit Clause to the Georgia custody decree on the ground that that decree would not have been given binding effect by the Georgia Courts. Petitioner asserts that this was a clearly erroneous interpretation of Georgia law and a circumvention of the mandate of the United States Constitution.

REASONS FOR GRANTING THE WRIT.

I. A State Court Has Decided a Federal Question of Substance in a Way Probably Not in Accord With the Applicable Decisions of This Court.

The United States Supreme Court has been confronted on three occasions with the question of the application of the Full Faith and Credit Clause, as implemented by Congress, to custody decrees. *Ford v. Ford,* 371 U. S. 187, 83 S. Ct. 273 (1962); *Kovacs v. Brewer,* 356 U. S. 604, 78 S. Ct. 963 (1958); *New York ex rel. Halvey v. Halvey,* 330 U. S. 610, 67 S. Ct. 903 (1947).

In each of these three cases, the Supreme Court expressly reserved judgment as to whether the Full Faith and Credit Clause requires one state to give full effect to a prior custody decree of a sister state. In all three cases, the Court held that the courts of the second state have "at least as much leeway to disregard the judgment [of a sister state], to qualify it, or to depart from it as does the State where it was rendered." *New York ex rel. Halvey v. Halvey, supra,* 330 U. S. at 615, 67 S. Ct. at 906, quoted with approval in *Kovacs v. Brewer, supra,* 356 U. S. at 607, 78 S. Ct. at 966.

In each of the three cases, *Halvey, Kovacs* and *Ford,* the United States Supreme Court looked to the law of the first state to determine the *res judicata* effect in that state of the prior judgment. In the instant case, the law of Georgia must be applied to determine the *res judicata* effect in Georgia of a prior Georgia custody decree.

The Court of Common Pleas of Montgomery County erroneously held (a) that Pennsylvania law was controlling in determining the custody issues presented, (b) that the Georgia custody decree was helpful but not controlling, (c)

that all custody decrees whether entered in Pennsylvania or a foreign jurisdiction are temporary in nature, (d) that Pennsylvania courts are not bound either legally or morally to the decree of a sister state awarding custody of a minor child, (e) that Pennsylvania courts may make an independent judgment of the ultimate question of the best interests of the child on the same facts that determined the order of a foreign state, and (f) that the Petitioner must bear the burden of producing compelling reasons, other than the Georgia decree, to disturb the present environmental situation of a child in Pennsylvania.

The basic error of the County court lay in the premises that the Full Faith and Credit Clause simply does not apply to foreign custody decrees, regardless of the res judicata effect such a decree might have in the other state. This is a deliberate avoidance of the clear mandate of the federal Constitution, as implemented by Congress, on the rationalization that the best interests of the child are of paramount consideration in custody cases, and always warrant a de novo review. Such a view subordinates the clear language of the Constitution and Congress to a particular concept of domestic relations law and has no support in the decisions of the United States Supreme Court. It is submitted that the harmonious working of the federal system in the United States must be given paramount consideration in all conflicts of law cases, whether involving domestic relations or any other field of state law. By constitutional and congressional mandate the judgments of a court in one state must be given the same effect in another state as they would have in the state of prior jurisdiction.

Refusal to apply the Full Faith and Credit Clause in child custody cases, simply because of the emotional situation involved, will result in just the forum-shopping this constitutional provision was designed to prevent. If Re-

spondent had lost in the courts below, there would have been nothing to prevent her from once more whisking the child out of Pennsylvania to find some other state where the law in custody matters might be more favorable to her. While the lower court said that it "does not countenance disregard of decrees of custody entered by our sister states", as "such action could lead to surreptitious and legalized abduction", (Opinion of Vogel, J., at 13), it is difficult to imagine a rule of law more calculated to sanction the willful evasion of normal legal processes than that adopted by the County Courts in this case.

The County Court should have first looked to the law of Georgia to determine the res judicata effect in Georgia of Georgia custody decrees. Upon determining that Georgia law treated custody decrees as res judicata on the ultimate question of custody, in the absence of material changes in circumstances requiring a modification of the prior judgment for the welfare of the child, the court should then have made specific findings as to whether there were any material changes in circumstances and, if so, their effect upon the welfare of the child.

It is clear from the record and Opinion of that court that the evidence presented did not show such material changes in circumstances as to require a modification of the Georgia decree for the welfare of the child:

> ". . . [T]he court has found both parents pleasant and fine people. Dr. Proctor, a dentist and former Navy pilot, is a man of substance and sincerely interested in his child, who commendably has used proper legal procedures to assert his position. . . . At present Dr. Proctor and his [new] wife live in physical surroundings adequate to care for a minor child." Opinion of Vogel, J., at 11.

The ruling of the Superior Court of Pennsylvania, in affirming the Court of Common Pleas of Montgomery County, erred in its interpretation of the *res judicata* effect in Georgia of a prior Georgia custody decree. The Superior Court read Georgia law to state that if a change in circumstances has occurred since the prior order, that order is not entitled to *res judicata* effect. However, the *res judicata* effect of a prior custody decree in Georgia is much greater than that in most states. For example, in *Bowen v. Bowen,* 223 Ga. 800, — S. E. 2d — (1967), the Court held:

> "Evidence showing merely a change in the circumstances of the party seeking a judgment different from the former judgment is not sufficient to authorize a change in the legal custody of a child. There must be a showing that the party to whom custody was originally awarded is no longer able or suited to retain custody or that the conditions and circumstances surrounding the child have so changed that the welfare of the child would be enhanced by modifying the original judgment. *Sells v. Sells,* 172 Ga. 911, supra; *Shields v. Bodenhamer,* 180 Ga. 122 (178 S. E. 294); *Hunnicutt v. Smith,* 218 Ga. 282 (127 S. E. 2d 375)" 223 Ga. at 800-801.

In *Stout v. Pate,* 209 Ga. 786, 75 S. E. 2d 748, cert. denied, 347 U. S. 968, 74 S. Ct. 774 (1953), the Court held:

> "A change of residence of one of the parents, in and of itself—if there be nothing in the previous order preventing the removal of the children from the State—would not be such a change of circumstances and conditions affecting the interest and welfare of the children as to authorize a modification of the judgment for that reason alone. . . ." 209 Ga. at 787.

CONCLUSION.

For the foregoing reasons, it is submitted that Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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JAMES F. MCCLURE, JR.,
Of Counsel.

APPENDIX TO PETITION.

IN THE

COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

No. 66-15339

RUSSELL BYNUM PROCTOR

v.

MARION KING PROCTOR.

OPINION

VOGEL, *J.*

This is a Petition for Custody instituted on December 14, 1966 by Dr. Russell Bynum Proctor, a resident and domiciliary of the state of Georgia against his former wife, Marion King Proctor, a resident and domiciliary of Montgomery County, Pennsylvania, in which a custody decree entered by the Superior Court of Camden County, Georgia, on November 7, 1966, is sought to be enforced. The petition asserts reliance upon the full faith and credit clause of the Constitution of the United States to support petitioner's position for obtaining custody of his minor child, Holly Christine Proctor, born December 21, 1959. The petition states: "That on November 7, 1966, in the Superior Court of Camden County, Georgia, in a proceeding initiated by

respondent where both petitioner and respondent were before the Court, a Final Judgment and Decree was entered awarding, inter alia, primary custody of the said minor child to petitioner herein, which Judgment and Decree is entitled to full faith and credit." Petitioner then asserts that said minor child is residing with her mother, the respondent, in Montgomery County, Pennsylvania, and prays the court to enter an Order on respondent to show cause why custody of Holly Christine Proctor should not be awarded to petitioner, in accordance with the above decree of the Georgia court.

Thereafter, the respondent and natural mother, Marion King Proctor, filed Preliminary Objections in the nature of a Demurrer, which pleading was overruled by the Court en banc on April 20, 1967. An Answer and New Matter were filed on April 28, 1967, alleging that the courts of Pennsylvania, by their decisions, have established that a foreign custody decree is not necessarily entitled to full faith and credit within the Commonwealth of Pennsylvania.

Hearings were held by the writer of this Opinion on May 18, 1967, July 7, 1967, July 14, 1967 and August 31, 1967 to aid in the determination of this matter.

On October 10, 1967, this court entered its Order awarding custody of minor child, Holly, to the respondent, Marion King Proctor, while at the same time, taking into consideration the distance the parties are now living from one another, affording the most liberal visitation privileges to the petitioner. An Appeal from the said Order was taken to the Superior Court by the petitioner on November 10, 1967. Hence this Opinion.

The testimony as presented on the above dates and a reading of the entire record reveals the following pertinent facts. Until June 8, 1966, all parties to this matter resided in the state of Georgia. In late February of 1966, the parties

separated from one another with Holly staying with her mother, and in April of the same year Mrs. Proctor instituted divorce proceedings against Dr. Proctor in Glenn County, Georgia, which cause of action was dismissed, apparently due to the lack of proper venue. Thereafter, Dr. Proctor requested the Juvenile Court of Camden County, Georgia to determine the custody of the minor child of the parties, Holly Christine Proctor, who was, at that time, still residing with her mother. That court, upon consideration of the petition of Dr. Proctor, on June 3, 1966 issued an Order stating that it would take full and complete jurisdiction of said juvenile as of that date and ordered the mother to appear at a hearing on June 11, 1966, to show cause why her parental care and custody should not be terminated. A copy of said Order was served on Mrs. Proctor through her attorney on June 6, 1966.

However, prior thereto, namely, the evening of Friday, June 3, 1966, Dr. Proctor had his son by a former marriage pick up Holly off the street and take her to the home of Mr. and Mrs. Walter Berry, friends of Dr. Proctor's in Camden County, Georgia where she stayed during the day and with her father at night. This taking of the minor child was said by Dr. Proctor to be under the authority of the above Order of the Juvenile Court of Camden County, Georgia. On Wednesday, June 8, 1966, respondent filed a libel for divorce in Camden County, Georgia Superior Court at No. D6624 and on that same day received a "Rule Nisi", awarding temporary custody of Holly to her. This Rule of Court also directed Dr. Proctor to return Holly to Mrs. Proctor and stayed the proceedings in the Juvenile Court until this matter was to be heard and determined.

Prior to the issuance by the Superior Court of Georgia of the above "Rule Nisi", but on the same day, June 8, 1966, Mrs. Proctor and an eighteen year old friend who was living

with her, Miss Vicky Rhodes, went to the home of Mr. and Mrs. Berry to get Holly. While at the Berry home, Mrs. Proctor obtained Holly forcibly by removing her from the Berry home with the aid of her friend who possessed Mrs. Proctor's .22 target pistol.

The respondent then drove to her counsel's office, where he told her that, under the above "Rule Nisi" of June 8, 1966, she could properly have the child since she had temporary custody of Holly. Mrs. Proctor then decided to leave Georgia and with this in mind, made arrangements with her sister of Bethesda, Maryland, left Georgia that day and went to Maryland where she stayed until July 27, 1966. Mrs. Proctor and Holly then went to the home of respondent's father and mother, Mr. and Mrs. Cecil King, in Worcester Township, Montgomery County, Pennsylvania, where they both have lived ever since, neither having, at any time, returned to Georgia, except Holly this past Christmas, in accordance with the Court's Order of October 10, 1967.

On August 20, 1966, the Superior Court of Camden County, Georgia, proceeding under a cross bill for divorce, filed by Dr. Proctor, entered an Order awarding temporary custody of Holly Christine Proctor to Dr. Proctor. Petitioner herein then came to Pennsylvania with his attorney to serve a copy of said Order, arriving August 27, 1967, and without giving prior notice, went to the King home. Mrs. King refused to allow Dr. Proctor to see either the respondent or Holly, as a result of which and on advice of counsel with him, the petitioner left a copy of the Georgia Court Order of August 20, 1966, at the front door of the King residence. He and his counsel then returned to Georgia.

Subsequent to the visit of Dr. Proctor, Mrs. Proctor consulted counsel in this area, and, after realizing that she would not return to Georgia under any circumstances, she discharged her attorney in Georgia, even though the cross

bill in divorce brought by Dr. Proctor was still pending. A hearing upon this action, in Georgia, after being continued on several occasions, was finally held on November 7, 1966 which resulted in the parties hereto being divorced and the Order of the Superior Court of Camden County, Georgia, awarding permanent custody of Holly to Dr. Proctor.

In determining the issues presented to this Court in the matter of the custody of Holly Christine Proctor, the law of the Commonwealth of Pennsylvania shall be applied and be determinative, for, as was stated in *Langen v. Langen,* 150 F. 2d 979, at page 983, ". . . The disposition of the child . . . (where its custody is in dispute) . . . must be made by the court which has jurisdiction of it and according to the law administered by that court, not according to the law of the place whence the child came or even of the domicile of the parents." In the present case, both parties recognize that this Court has jurisdiction of the minor child involved, since from July 27, 1966, to the present she had resided within Montgomery County, Pennsylvania, with her natural mother, respondent, Marion King Proctor. Therefore, this state having jurisdiction, the law of Pennsylvania shall be controlling.

Account must be taken of two considerations in determining whether full faith and credit will be given in the present case to a custody decree entered by the Georgia Court. The first of these is whether that Court could validly provide for the custody of minor child, Holly Christine Proctor, and the second is the power of the Courts of this Commonwealth, which has actual control of said child, to make a proper determination of the child's welfare.

Regarding the first of these factors, namely, the validity of the custody decree of November 7, 1966, entered by the Georgia Superior Court, it must be determined whether that Court had proper jurisdiction to enter a decree awarding custody of a minor child who was not within that State's

territorial limits as of November 7, 1966 since she became a resident of Pennsylvania, having been intentionally removed from Georgia by respondent herein. Said Order of the Georgia Court was an adjudication of a cross bill in divorce filed by Dr. Proctor in reply to a libel in divorce instituted by respondent herein, Mrs. Proctor.

In the case of *Commonwealth ex rel. Scholtes v. Scholtes,* 187 Pa. Superior Ct. 22 (1958), wherein a father had filed a petition for a writ of habeas corpus regarding the custody of his minor child and then forcibly removed said child from this Commonwealth and withdrew his petition, the Pennsylvania Superior Court, in determining the mother's subsequent petition for a writ of habeas corpus, stated at page 25:

> "The mother's petition for writ of habeas corpus, while a separate proceeding, was in effect a continuation of the proceedings instituted by the father . . . A court should not permit a party to shortcircuit a legitimate proceeding by removing the subject matter of the litigation from the jurisdiction of the court properly acquired . . . The taking of the child out of the jurisdiction by the father after the institution of his suit should not be permitted to affect the result."

Thus, according to the principles of Pennsylvania law as laid down by our Court, the Georgia Superior Court had proper jurisdiction to determine the custody of Holly Christine Proctor even though she was not then a resident of that State and the decree of that Court of November 7, 1966, awarding permanent custody of said minor child to the father, Dr. Proctor, was a valid one.

With regard to the second consideration, namely, the power of the Courts of this Commonwealth, which has actual control of the minor child, to make proper determination with regard to a child's welfare, the effect of the foreign

decree upon the Pennsylvania Courts is helpful but not controlling. The leading Pennsylvania case on this issue is *Commonwealth v. Davin,* 298 Pa. 416 (1930). What was there stated on page 422 is particularly apposite:

> "There are authorities . . . . which hold that the award of the custody of children in one jurisdiction cannot be properly changed in another except on proof of changed conditions and that the burden of proof as to the latter rests upon the one who is seeking a change of custody (citation omitted). This is not consistent, however, with the principle on which the leading cases rest, viz.; that whenever a court is called upon to award the custody of a child, the guiding star is its welfare. And the court where the matter is pending must decide that grave question on its own best judgment, unfettered, but not necessarily uninfluenced, by a prior adjudication."

In *Kovacs v. Brewer,* 356 U. S. 604 (1958), it was stated at page 607:

> "Whatever effect the Full Faith and Credit Clause may have with respect to custody decrees, it is clear, as the Court stated in *Halvey,* 'that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.'"

With all due regard and respect for our sister State of Georgia and its determination, it would appear that the Order of November 7, 1966, awarding Holly to the petitioner, Dr. Proctor, was made without the Court seeing or hearing either the respondent or the child involved. Of course, no criticism of the same can be made, for it was the respondent's indiscretion in leaving Georgia with Holly in June of

1966 which precluded such a hearing by the Georgia Court. However, the four hearings held by this Court provided the *first forum* where the merits of both parties as well as Holly's feelings could be determined.

No rule of law is more clearly determined that in a custody proceeding involving a minor child, the paramount consideration is the ultimate welfare and best interests of the child and all other considerations, including the rights and desires of the parents are subordinate to the child's physical, intellectual, moral, spiritual and emotional well being. *Commonwealth ex rel. Thomas v. Gillard,* 203 Pa. Superior Ct. 95 (1964), *Commonwealth ex rel. Willouer v. Willouer,* 192 Pa. Superior Ct. 625 (1960). Moreover, the welfare of the child must be determined as of the time of the hearing before the Court and not at some former time. *Commonwealth ex rel. Shipp v. Shipp,* 209 Pa. Superior Ct. 58 (1966); *Commonwealth ex rel. Wert v. Long,* 196 Pa. Superior Ct. 632 (1961). Preference as to the child's wish, while not controlling, is also to be considered and was done so in this case as expressed by Holly in the notes of testimony of July 14, 1967.

Full faith and credit must be given to the decrees of a sister State awarding custody of a minor child insofar as it determines the status at the time it was issued. *Commonwealth ex rel. Thomas v. Gillard,* supra. Also, said orders of a sister State, which incorporate certain findings of fact, renders those facts found in the foreign proceeding res judicata and not open to question by the Courts in another jurisdiction. *Commonwealth ex rel. Gregory v. Gregory,* 188 Pa. Superior Ct. 350 (1958); *Commonwealth ex rel. Graham v. Graham,* 167 Pa. Superior Ct. 470 (1950). However, due to the fact that the controlling factor in all proceedings is the welfare of the child, all custody decrees, whether entered in this Commonwealth or a foreign jurisdiction, are accordingly temporary in nature, and the Courts

of this Commonwealth are not bound either legally or morally to the decree of a sister State awarding custody of a minor child, even though they cannot lightly ignore the considered judgment of a sister State, and an independent judgment of the ultimate question of the best interests of the child may be made by said Courts on the same facts that determined the order of the foreign State. *Commonwealth ex rel. Thomas v. Gillard, supra; Commonwealth ex rel. Dinsmore v. Dinsmore,* 198 Pa. Superior Ct. 480 (1962); *Commonwealth ex rel. Bradley v. Bradley,* 188 Pa. Superior Ct. 108 (1958); *Commonwealth ex rel. Maines v. McCandless,* 175 Pa. Superior Ct. 157 (1954); *Commonwealth v. Daven, supra.* Accordingly, petitioner's assertion at the hearing on May 18, 1967, that this Court could and should not proceed with a hearing since full faith and credit must be given to the Georgia decree of November 7, 1966, and no change of circumstances existed to warrant a denial of the Georgia decree, is in error and this Court properly received testimony in this proceeding. This is particularly so since no hearings as to respondent or Holly occurred in Georgia.

It is hornbook law in Pennsylvania that a mother has a prima facie right to the custody, care and companionship of a child of tender years over any other person, including the father, since children of tender years are presumed to need the care of their mother more than the care of the father. *Commonwealth ex rel. Logue v. Logue,* 194 Pa. Superior Ct. 210 (1960); *Commonwealth ex rel. Williams v. Price,* 167 Pa. Superior Ct. 57 (1950); *Commonwealth ex rel. Tuley v. Tuley,* 40 D. & C. 2d 623 (1966). This is particularly true where the child is a female. *Commonwealth ex rel. Horton v. Burke,* 190 Pa. Superior Ct. (1959). However, this right of the mother is not absolute and must yield to the best interest and welfare of the child. *Commonwealth ex rel. Swartzwelder v. Swartzwelder,* 162 Pa. Superior Ct. 366 (1948). Thus, where compelling reasons appear to the

contrary, such child need not necessarily be committed to the care and custody of its mother. *Commonwealth ex rel. Gates v. Gates,* 161 Pa. Superior Ct. 423 (1947).

In cases involving the custody of a minor child, what is in the best interest of the child and its permanent welfare is to be decided, not in relation to a fixed standard, but by determining what is best for the child under all of the circumstances. *Commonwealth ex rel. Martocello v. Martocello,* 148 Pa. Superior Ct. 562 (1942).

Where the dispute is between the father and the mother, the fitness of each parent to have custody of the child is to be considered as well as the best interest and permanent welfare of the child. *Commonwealth ex rel. Hubbell v. Hubbell,* 176 Pa. Superior Ct. 186 (1954). In this regard it must be mentioned here that the court has found both parents pleasant and fine people. Dr. Proctor, a dentist and former Navy pilot, is a man of substance and sincerely interested in his child, who commendably has used proper legal procedures to asset his position. On or about November 10, 1966, Dr. Proctor met his present wife who he married on February 18, 1967. It would appear that Holly never knew the present Mrs. Proctor. At present Dr. Proctor and his wife live in physical surroundings adequate to care for a minor child. On the other hand, respondent is a most pleasant, well mannered and capable individual. Her parents, Mr. and Mrs. Cecil King, with whom she and Holly live, have a fine home and surroundings which are very suitable for Holly. Holly is most content and prefers to live with her mother, does well at school and loves her grandparents. While Mrs. Proctor suffers from an illness, it in no way impedes or hinders her excellent care of Holly.

Thus, this court is of the opinion, after the most careful and strenuous considerations of the various factors involved, that the best interests and permanent welfare of

the minor child, Holly Christine Proctor, would be best served by awarding her custody to the respondent, her natural mother, Marion King Proctor. As was stated by the Superior Court in *Commonwealth ex rel. Maines v. McCandless, supra,* at page 163:

> "Decisions in cases of this character are always unpleasant. The father is undoubtedly devoted to the child and would give her all the care and attention of which he is capable. However, considering all of the circumstances, including the age and sex of the child,
>
> . . . [it is this courts decision] . . . that the little girl's welfare is best served by allowing her to remain with her mother."

This court finds no compelling reason to disturb the present environmental situation where Holly lives and is most happy. To uproot her from the custody of her mother, who has cared for her since birth at this tender yet most critical stage of her life, might have a very unfavorable effect upon Holly without any logical or necessitating reason. As was stated in *Commonwealth ex rel. Shipp v. Shipp, supra,* where similar circumstances were present, on page 62:

> "We fear this effect and do not favor running the risk of it unless the reasons are most compelling."

One final consideration is to be discussed and that is Mrs. Proctor's indiscretion in obtaining and removing Holly from Georgia on June 8, 1966. In this regard, not without interest, is the fact that petitioner's son on June 3, 1966, prior to any definitive court Order, took Holly off the street to the petitioner.

Although this court certainly does not mean to condone respondent's actions in removing her daughter from

the state of Georgia, it feels that the indiscretion of the mother in seeking and removing her child from Georgia is not of such a compelling nature as to deprive her of custody of the child. *Commonwealth v. Davin,* 298 Pa. 416 (1930); *Commonwealth ex rel. Wert v. Long,* 196 Pa. Superior Ct. 632 (1961); *Commonwealth ex rel. Snapir v. Snapir,* 196 Pa. Superior Ct. 38 (1961); *Commonwealth ex rel. Scholtes v. Scholtes,* 187 Pa. Superior Ct. 22 (1958); *Commonwealth ex rel. Schofield v. Schofield,* 173 Pa. Superior Ct. 631 (1953); *Commonwealth ex rel. Lewis v. Tracy,* 155 Pa. Superior Ct. 257 (1944); *Commonwealth ex rel. D'Ercole v. Barnes,* 86 D & C 509 (1953).

As was stated in *Commonwealth ex rel. Thomas v. Gillard,* 203 Pa. Superior Ct. 95 (1964) at page 100:

> "Although not condoning the method by which jurisdiction was returned to the Commonwealth by the mother, under all the circumstances of this case the court below was justified in *looking at all the circumstances at the time of the hearing and in holding that the California decree was temporary in nature and the paramount consideration of the welfare of the child dictated his decision.*" (Emphasis Courts)

While the *Gillard* case, *supra,* dealt with a custody proceeding where Pennsylvania had original jurisdiction of the child which child, on a pretext, was removed by the father to California and then secretly returned to this state by the mother, in defiance of a California decree awarding custody to the father, this court holds that the principle of law as above set forth in the *Gillard* case, *supra,* is the same and clearly applies to the present case where this court did not have original jurisdiction. Indeed, if the petitioner attempts to distinguish the *Gillard* case, *supra,* from the present proceeding, for the reason just

mentioned, he asserts, in this courts opinion, a distinction without a difference.

This court does not countenance disregard of decrees of custody entered by our sister states. Such action could lead to surreptitious and legalized abduction. *Gillard* case, *supra*. Such is not the case in the present proceeding. Rather, the welfare and best interests of a minor child is always and irrevocably the dominant consideration and polestar of every custody proceeding. Holy Christine Proctor comes under the protection of that rule of law. Logic dictates, the law justifies and the facts command that the Petition for Custody filed December 14, 1966 be dismissed and the respondent be awarded custody of the minor child, Holly Christine Proctor, with visitation privileges afforded petitioner as determined in this courts Order of October 10, 1967.

By THE COURT,

WILLIAM W. VOGEL, *J.*

DATED: February 29, 1968

IN THE

COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

No. 66-15339

RUSSELL BYNUM PROCTOR

v.

MARION KING PROCTOR

ORDER.

AND Now, this 10th day of October, 1967, after hearings on May 18, 1967, July 7, 1967, July 14, 1967 and August 31, 1967, with regard to petitioner's, Russell Bynum Proctor, Petition for Custody, the custody of the minor child, Holly Christine Proctor, is awarded to the respondent, the natural mother, Marion King Proctor, of Skippack Pike, Worcester Township, Montgomery County, Pennsylvania, with the following visitation privileges afforded the petitioner, namely, the petitioner is awarded visitation privileges beginning two (2) calendar days after commencement of Christmas vacation of the minor child until two (2) calendar days before the expiration of the said Christmas vacation; visitation privilege beginning two (2) calendar days after commencement of spring or Easter vacation until two (2) calendar days before the expiration of said spring or Easter vacation; and visitation privilege commencing from one (1) calendar week after the close of the school year of the said minor child continuously until one (1) calendar week prior to the opening of the next school year which visitation

privileges the petitioner shall be afforded at his home in the state of Georgia, provided petitioner provides the necessary funds for transportation for the minor child to and from the residence of the respondent to the residence of the petitioner.

Also, petitioner shall file with this court a Compliance Bond or sufficient security in the amount of One Thousand Dollars ($1,000.00) to insure the return of the minor child, Holly Christine Proctor, from without this jurisdiction to the custody of respondent at the termination of visitation privileges granted herein and failure of petitioner to so comply shall result in the forfeiture of said bond or security.

BY THE COURT,

WILLIAM W. VOGEL, *J.*

IN THE

SUPERIOR COURT OF PENNSYLVANIA

No. 39 October Term, 1968

RUSSELL BYNUM PROCTOR,

Appellant

v.

MARION KING PROCTOR

Appeal From Order of the Court of Common Pleas of Montgomery County, No. 66-15339

Opinion by Hoffman, *J.*: Filed: September 12, 1968

This case is an appeal from a custody order of the Court of Common Pleas of Montgomery County.

The parties were married and resided in Georgia; a daughter, Holly, was born of that marriage, in December, 1959. In February, 1966, the parties separated and Holly remained with her mother, Mrs. Proctor. In June, 1966, a Georgia court action to obtain custody of Holly was instituted by her father. Subsequently, Mrs. Proctor was advised by her attorney that she had been awarded temporary custody of Holly by the Georgia court, which retained continuing jurisdiction. That same day, Mrs. Proctor filed a libel for divorce in Georgia, and, together with Holly, left Georgia. After a three week stay in Maryland, they moved into the home of Mrs. Proctor's parents in Montgomery County, Pennsylvania, where they have resided for the past two years.

On August 20, 1966, the Georgia Superior Court of Camden County, proceeding under a cross bill filed by Dr.

Proctor, in the divorce action, entered an order awarding temporary custody of Holly to Dr. Proctor. He then came to Pennsylvania with his attorney and served a copy of the order on Mrs. Proctor on August 27, 1966. A hearing upon these actions in Georgia was held on November 7, 1966, which resulted in the awarding of permanent custody of Holly to Dr. Proctor.

On December 14, 1966, Dr. Proctor instituted a Petition for Custody of Holly in the Common Pleas Court of Montgomery County. On October 10, 1967, that court entered an order awarding custody of Holly to Mrs. Proctor with reasonable visitation rights allowed Dr. Proctor. That order is now on appeal.

This case presents the following questions: 1) Is Pennsylvania bound by the Georgia custody order of November, 1966, 2) If not, what disposition should be made?

Appellant asserts that the full faith and credit clause Article IV, Section I, of the United States Constitution requires Pennsylvania to enforce the decree of the Georgia Court awarding permanent custody to Dr. Proctor. He is mistaken, even though under Pennsylvania law Georgia had proper jurisdiction on November 17, 1966 to determine the custody of Holly who was not then physically resident there.[1]

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1. In *Com. ex rel. Scholtes v. Scholtes*, 187 Pa. Superior Ct. 22, 142 A. 2d 345 (1958), a mother filed a petition for writ of habeas corpus to gain custody of her minor child when previously the father had filed a petition for writ of habeas corpus regarding the custody of the minor child and then forcibly removed the child from Pennsylvania. In asserting jurisdiction to hear the case our Court at p. 25 stated: "The mother's petition for writ of habeas corpus while a separate proceeding, was in effect a continuation of the proceedings instituted by the father. A court should not permit a party to short circuit a legitimate proceeding by removing the subject matter of the litigation from the jurisdiction of the court properly acquired. . . . The taking of the child out of the jurisdiction of the

The United States Supreme Court has pointed out in *Halvey v. Halvey*, 330 U. S. 610 at 615 (1947), and reiterated in *Kovacs v. Brewer*, 356 U. S. 604 at 607 (1958), that it is clear with respect to custody decrees "that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered."

Applying this constitutional test, Pennsylvania has at least the same latitude to abandon the Georgia custody decree as would the Georgia court applying Georgia law. Under Georgia law, custody decrees are awarded solely on the basis of best serving the child's welfare. *Lockhart v. Lockhart*, 173 Ga. 846, 162 S. E. 129 (1931); *Kniepkamp v. Richards*, 192 Ga. 509, 16 S. E. 2d 24 (1941). These decrees may be modified or vacated when subsequently there is a "substantial change [in circumstances] not naturally expected that affects the welfare of the child . . ." *Bowen v. Bowen*, 223 Ga. 800, 158 S. E. 2d 233 (1967). Georgia does not require as a prerequisite to a modification of a custody decree that the original party awarded custody be unfit to continue in that capacity, but only that there be a change in circumstances materially affecting the welfare of the child. *Adams v. Hefferman*, 217 Ga. 404, 122 S. E. 2d 735 (1961). This change in circumstances need not be of a moral or financial character. *Handley v. Handley*, 204 Ga. 57, 48 S. E. 2d 827 (1948) and the court is "given wide discretion in such cases." *Danner v. Robertson*, 221 Ga. 516, 145 S. E. 2d 554 (1965). Hence if a change in circumstances has occurred since Georgia rendered her November 7, 1966 custody order, that order

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court by the father after the institution of his suit should not be permitted to affect the result."

Likewise, in the instant case, Georgia was sufficiently interested in Holly since she had been born and raised there and her father intended to remain in Georgia. A few months' absence would not defeat Georgia's jurisdiction over her.

is not entitled to res judicata effect in Georgia and therefore, is not entitled to full faith and credit by Pennsylvania.[2]

In making our award, the following facts are relevant in determining whether full faith and credit is required of Pennsylvania and how custody should be awarded by the Pennsylvania court.

Holly is now almost eight years old. For the past two years she has resided with her mother and maternal grandparents in Montgomery County. In that time she has formed new attachments and friendships. She attends school and is settled and going well. As evidenced by the lower court's in chambers conversation with her, Holly appears to be healthy, secure and content in her Pennsylvania environment. She is more than adequately cared for by her mother and grandparents. The lower court found that Holly now lives in a fine home and surroundings which are very suitable for her. It further characterizes Mrs. Proctor as providing "excellent care of Holly."

In the light of these facts, there has been a significant change in Holly's life situation since the rendering of the Georgia custody decree. She is no longer the same youngster that she was in Georgia. Two years in the life of a girl of such tender years is a very long time. She can no longer recollect with any precision what her life back in Georgia was like. To send her back there now would virtually require her to blot out the last two years of her existence and sever all her present attachments. She would be returned to an environment where she has no friends in her peer group, where she would have to attend a school this is new and different and where she would have to make

2. This is in full accordance with our Supreme Court's statement that full faith and credit need not be given to an out of state custody decree when at least there have been "substantial and important changed circumstances" since it was rendered. *Brocker v. Brocker*, 429 Pa. 513 at 525, A. 2d (1968).

all the subtle and difficult adaptions in outlook required of children moving from one region of the country to another.

Thus, we are persuaded that, under Georgia law, the facts of this case present a sufficient material change in circumstances necessitating a modification of the Georgia custody decree. Regardless of whether Mrs. Proctor's taking of Holly from Georgia was wrongful, the only salient consideration under Georgia law is the welfare of Holly. We believe that a Georgia court would not consider the November, 1966 custody order as res judicata and return Holly to her father and step-mother in Georgia. To do so might cause irreparable harm to the child, as Holly would have to abandon her present secure existence and face a new and uncertain environment in Georgia. Holly has been shuttled about too much already for a child of such tender years. As there is no rule in Georgia that custody cannot be awarded to a nonresident parent, *Johnson v. Johnson,* 211 Ga. 791, 89 S. E. 2d 166 (1955), under the clear language of *Kovacs v. Brewer, supra,* full faith and credit need not be given to the Georgia custody decree by Pennsylvania.

Since the best interests of Holly dictate that she remain with her mother,[3] we affirm the order of the lower court.

Order affirmed.

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3. We need not decide whether to apply Georgia or Pennsylvania custody law in making this determination, because the custody law of each jurisdiction, as applied to the facts in this case, would lead to the same result. In Georgia as well as Pennsylvania the controlling consideration in a custody proceeding is the best interest and permanent welfare of the child. Act of June 26, 1895, P. L. 316, § 2, 48 P.S. § 92; *Commonwealth ex rel. Harry v. Eastridge,* 374 Pa. 172, 97 A. 2d 350 (1953); Ga. Code Ann. § 74-107. But if the application of each jurisdiction's laws pointed to dissimilar results, then we might be led to a choice of laws, which would be made in a context apart from the requirements of full faith and credit. Cf. *Commonwealth ex rel. Sage v. Sage,* 160 Pa. 399, 28 Atl. 863 (1894); *Griffith v. United Air Lines,* 416 Pa. 1, 203 A. 2d 796 (1964).

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 387-A MISCELLANEOUS DOCKET No. 16.

RUSSELL BYNUM PROCTOR,

Petitioner

v.

MARION KING PROCTOR

PETITION FOR ALLOWANCE OF APPEAL FROM JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA.

ORDER.

April 24, 1969

Denied

Per Curiam.

STATUTE INVOLVED.

28 U. S. C. § 1738. State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.